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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1959

No. 1959

INDIAN TOWING CO., INC., ET AL.,
Petitioners,

versus

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT.

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Petitioners pray that a writ of certiorari issue to review a judgment of the United States Court of Appeals for the Fifth Circuit and in support of their petition show:

OPINIONS BELOW AND JURISDICTION.

The findings of fact and conclusion of law constituting the opinion of the District Court (R. 582) are printed in Appendix A hereto and are reported in 182 Fed. Supp. 264. The opinion of the Court of Appeals (R.

598) is printed in Appendix "B" hereto and is reported in 276 Fed. (2d) 300.

The judgment of the Court of Appeals, dated February 29, 1960, was entered the same date (Appendix C). The jurisdiction of this Court is invoked under 28 U. S. C. Sec. 1254 (1). Upon application of counsel for petitioners, the time for filing a petition for writ of certiorari in this case was extended up to and including June 30, 1960, by order of this Court dated May 19, 1960 (Appendix D).

QUESTIONS PRESENTED.

The questions presented here are the following:

1. Does the standard of care imposed upon the United States Coast Guard in the maintenance of aids to navigation permit that agency to install the component parts of a light circuit in a lighthouse with the intention of leaving those parts on station until a failure occurs, or is the Coast Guard required to conduct periodic inspections of the component parts of the light circuit in order to discover and correct defects resulting from wear and tear before a failure of the light occurs?

2. Does the application of the doctrine of *res ipsa loquitur* in a case in which the Coast Guard is charged with negligent maintenance of a lighthouse impose insurer liability on the Coast Guard?

STATUTES INVOLVED.

The statute which has been interpreted by the prior opinion of this Court and which must be applied in determining the issues presented by this petition is the Federal

Tort Claims Act, 28 U. S. C. Section 1346(b) printed as Appendix E. In addition, petitioners refer to the statutory authority pursuant to which the United States Coast Guard established and maintained the lighthouse on Chandeleur Island, which authority is found in 14 U. S. C. 81, printed as Appendix F.

STATEMENT OF THE CASE.

This Court has said in a prior opinion in this case that the United States Coast Guard is obligated to use due care to make certain that lighthouses operated by the Coast Guard are kept in good working order. The language of this Court in *Indian Towing Company v. The United States of America*, 350 U. S. 61, 76 S. Ct. Reporter 122, at page 126, is as follows:

> "The Coast Guard need not undertake the lighthouse service. But once it exercised its discretion to operate a light on Chandeleur Island and engendered reliance on the guidance afforded by the light, **it was obligated to use due care to make certain that the light was kept in good working order;** and, if the light did become extinguished, then the Coast Guard was further obligated to use due care to discover this fact and to repair the light or give warning that it was not functioning. If the Coast Guard failed in its duty and damage was thereby caused to petitioners, the United States is liable under the Tort Claims Act." (Emphasis ours.)

The casualty out of which this litigation arose occurred on the night of September 30-October 1, ~~1950~~ 1951. The Barge AS-16, owned by United Marine Company, one of

petitioners, and carrying 1204.5 tons of triple super phosphate, owned by Minnesota Farm Bureau Service Co., another of the petitioners, was in tow of the Tug NAVAJO, owned by Indian Towing Company, also named as a petitioner, proceeding westward from Tampa to New Orleans in the Gulf of Mexico. The lighthouse on Chandeleur Island off the Mississippi Coast failed some time prior to the night in question and was not in operation as the tow approached the island. (R. 144-45). Visibility was poor and the wind was from 30 to 35 miles per hour, with waves six to seven feet in height. The captain of the NAVAJO was looking for and expecting to see Chandeleur light, and, since the light was extinguished, ran aground. (R. 114.) The grounding caused substantial damage to the Barge AS-16 and her cargo. Petitioners contend that the failure of the light was the cause of the grounding and subsequent damage to the Barge AS-16 and her cargo and that the failure of the light resulted from the negligence of Coast Guard personnel in that they failed to exercise due care in the maintenance of the sun relay which was a part of the circuit of the light.

This case was initiated by the filing of a civil action under the Federal Tort Claims Act. Respondent moved to dismiss on the ground that the cause of action alleged was not without the purview of the statute, and the motion was granted. (R. 9.) Petitioners appealed and the Court of Appeals for the Fifth Circuit affirmed the action of the trial judge. (R. 16.) This Court granted certiorari and reversed (R. 17), and a trial on the merits followed before the same judge who had originally granted respondent's motion to dismiss, culminating in the trial court's acceptance, without modification, of

proposed finding of fact and conclusion of law submitted by the respondent. (R. 582.) The Court of Appeals, speaking through a member of the panel which had affirmed the original dismissal of this action, endorsed the findings and conclusions of the trial judge, stating that the doctrine of *res ipsa loquitur*, upon which petitioners rely, does not place upon the respondent liability without fault or make respondent an insurer of the operation of the lighthouse on Chandeleur Island. (R. 600.)

ARGUMENT UNDER THE FIRST QUESTION.

The issue presented here is whether the owners of the Barge AS-16 and her cargo are entitled to recover for the damages which they sustained. Although Indian Towing Company, the owner of the tug NAVAJO, appears as a nominal party in this case, no recovery is sought for any damage sustained by the tug. The question which must be determined is whether the failure of the lighthouse contributed to the grounding of the barge. It is not necessary to consider whether or not the negligence of the Tug NAVAJO contributed to the grounding, for whatever negligence may have occurred on the part of those in charge of the NAVAJO would not be attributed to the innocent barge and cargo. *The Cutler*, 58 F. Supp. 864 (D. C. N. Y. 1944), affirmed 147 F. (2d) 545 (C. C. A. (2d) 1945); *The Pure Oil Company v. Tugs Fred B. Zigler & Z-Eight* (D. C. L. A.) 1952 A. M. C. 1518; *The William C. Atwater*, 110 F. (2d) 644 (C. C. A. (2d) 1940); *Marian J.-Maple Hill* (C. C. A. (2d) 1932 A. M. C. 1278); *The Atlas*, 93 U. S. 302; *The Beaconsfield*, 15 S. Ct. 860. As long as there is a degree of contributing fault on the part of the respondent, the owners of the barge and the cargo laden therein are entitled to recovery.

even though the negligence of the NAVAJO was also a contributing cause. This is so even if the NAVAJO'S negligence outweighed that of the respondent. *Ryan v. Dendinger, Inc.*, 9 S. (2d) 849; *The O'Brien Brothers*, 258 Fed. 614; *Old Dominion Steamship Co. v. Gilmore*, 28 S. Ct. 133; *White v. State Farm Mutual Auto Insurance Co., et al.*, 60 S. (2d) 245; *Halcyon Lines, et al., v. Haenn Ship Ceiling and Refitting Corp.*, 72 S. Ct. 277; *Hoesel v. Cain*, 53 N. E. (2d) 165; *Eidson, et al., v. Maddox*, 24 S. E. (2d) 895; *Spears v. United Railroad of San Francisco*, 117 Pacific 956; *Cordinger v. Los Angeles Traction Company*, 127 S. W. (2d) 105; *Haynie v. Jones, et al.*, 32 N. E. (2d) 561; *Smith v. Fisher, et al.*, 115 N. E. (2d) 78; *Glass v. McCullough Transfer Co.*, 189 F. (2d) 105. In deciding this case with emphasis on the negligence of the Tug NAVAJO, the District Court and the Court of Appeals have impliedly and erroneously attributed that negligence to the barge and her cargo.

Since the causal connection between the failure of the light and the grounding of the barge is obvious beyond the possibility of argument, the government did not propose to the District Court a finding that the failure of the light did not contribute to the grounding. The District Court and the Court of Appeals avoided any conclusion with reference to the causal connection between the light's failure and the grounding, and confined their conclusions instead to the fact that the negligence of Coast Guard personnel did not contribute to the grounding of the barge. (R. 595, 599.) Thus, on the face of the record, neither Court has decided whether or not the failure of the light was causally connected to the grounding of the barge. This is a significant omission in view of the fact that the

government's navigational expert testified that in his opinion the grounding would not have occurred if the light had been in operation. (R. 303.) It is clear from a reading of the findings of the trial judge that this case was disposed of on the basic proposition that the failure of the light did not cause the grounding, and that the negligence of the navigator of the NAVAJO did. Pretermitting entirely the fact that such negligence, if it occurred, is not attributable to the barge and her cargo, and considering only the causation problem, *i. e.*, the relation between the failure of the light and the damage caused to the owners of the barge and cargo, it is pertinent to point out the verbiage of the statute pursuant to which the Coast Guard established and maintained Chandeleur Light. That statute, appearing as Appendix F, provides that the purpose of aids to navigation including Chandeleur Light is "to aid navigation and to prevent disasters". It is apparent from the wording of the statute that lighthouses are maintained to prevent marine disasters even though the navigator of a vessel does not navigate perfectly. The owners of the Barge AS-16 and her cargo were entitled to the warning afforded by the Chandeleur Light even though the Tug NAVAJO may not have been navigated perfectly. Since the light failed to serve one of the purposes for which it was established, the causal connection between that failure and the grounding, insofar as the barge and cargo are concerned, cannot be seriously questioned.

The failure of Chandeleur Light resulted from the pitting and scoring and corrosion of the contact points in the sun relay which was a vital component part of the circuit of the light. (R. 26, 592.) The electrical system

in the light was installed in July of 1949, less than two years before the failure which caused this grounding, and consisted of a set of wet storage battery cells totalling 32 volts, a flasher mechanism, a lamp changer, and a sun relay unit which caused the light to function at night and turned it off during the daylight hours to conserve the batteries. The sun relay itself consisted principally of a metal cylinder coated with carbon. During the day the cylinder absorbs heat and the increase in temperature causes the cylinder to expand. This expansion is transmitted to a pivotal arm which moves up and down, making and breaking contact with a silver base plate in the relay. During the night the silver points at the end of the pivotal arm are in contact with the silver base plate, completing the circuit, while during the day the contact points separate from the base plate, breaking the circuit. The relay is not installed directly in the main 32-volt circuit, but in a separate 12-volt circuit, because the contact points hold up more satisfactorily under lower voltage. (R. 248.) The relay is a reliable device which operates for years if properly maintained. However, the pitting of its contact points is a natural consequence of use and the points require cleaning and adjustment at intervals which vary according to the electrical load carried. (R. 493.)

The nature and extent of the pitting which caused the failure in this instance was described in the cross-examination of Warrant Officer Holmes of the Coast Guard, who was in command of the party which repaired the light after the failure (R. 460):

"Q. Mr. Holmes, I want you to describe for me in a little more detail this pitting that you

found on the base plate. Was it—well, I think I'll leave it to you, to use your words. What did it look like to you?

A. Did you ever see fine gritted sandpaper?

Q. Yes.

A. That but on a dark color.

Q. Now this was just a material which had formed on the base plate?

A. To my knowledge, yes, sir.

Q. Was there damage to the plate itself?

A. Damage? To what effect, sir?

Q. To the plate itself. Was the surface of the plate damaged?

A. It would be damaged if there was pitting, sir.

Q. Then I understand you to mean that the plate itself was scored, was it not?

A. Not to any great extent, sir.

Q. Well, it was scored to an extent which in your opinion prevented it from making contact, wasn't it?

A. I won't say scored, sir; I'll say the pitting on it prevented it from making the contact.

THE COURT: Well was it sort of a deposit on there?

THE WITNESS: Yes, sir, more like a deposit. In other words, it didn't eat down into the metal to any great degree where it would have been impossible to remove it by swiping across your plate.

Q. Well then why did you regulate the arm so that it would make contact at a different place on the plate?

A. As a preventative measure.

Q. In other words, you thought that perhaps the plate had been damaged to an extent which would interfere with the contact?

A. As a preventative measure.

Q. Am I stating it correctly?

A. As a preventative measure, yes, sir.

Q. Wait, just a moment. I say from what you observed you thought that possibly the plate had been damaged to an extent which would interfere with future contacts?

A. I didn't think that it would prevent or - - - prevent any future contacts. I wanted to do something to prevent a reoccurrence of the fact that if one section of it was damaged this time, maybe if you put the points back in the same section again, that point would be more vulnerable to damage than a new point.

Q. Now, I'm reading from your prior deposition - - -

A. Yes, sir.

Q. - - - in which you say that, in describing what you saw and indicating the base plate, you say, 'In here, this was **all scored** and **corroded** and **pitted** up to a degree where it wouldn't make proper contact.' Is that an accurate description of what you saw?

A. Well, to a certain degree. In other words, a fine point like that, you're not gouging or anything or massive holes in it. A little object like this, which is probably an eighth of an inch wide and a half inch long, any pitting on it would give indications that it was marred.

Q. Do you still accept the language which I read to you as accurate?

A. I will accept it, sir, if I said it.

Q. Was the condition which you saw a highly unusual condition.

A. It was my first occurrence with that condition.

Q. You had never seen a base plate pitted to that extent before?

A. I've never seen this - - - any base plate in a sun relay pitted period.

Q. At all?

A. No, sir.

Q. So that what you found was a very unusual condition, was it not?

A. To the best of my knowledge, it was." (Emphasis ours.)

All of the expert testimony in the record, from witnesses for both parties, showed that the pitting and scoring and corrosion which caused the failure of the light was in turn caused by the fact that current in excess of that which was recommended by the manufacturer was permitted to pass through the contact points in the relay at some time prior to failure. (R. 249, 250, 322-324.) Respondent's personnel conducted periodic inspections of the

lighthouse, but they were instructed not to remove the base cover of the relay to check the contact points in the relay, and in fact the points were not checked during periodic inspections in order to determine whether a gradual pitting condition was developing (R. 400, 401); nor did respondent's personnel ever check the circuit to determine the amount of current passing through the contact points during the operation of the relay. (R. 406, 378.)[1]

The electrical experts who testified at the trial agreed that the pitting described by Holmes was the result of current in excess of that recommended by the manufacturer passing through the points of the relay. It follows inevitably that either the original installation of the relay was improper, or that something occurred between the time of installation in July of 1949 and the time of failure in September 1951 which caused or permitted excess current to flow through the contact points of the relay. The source of the excessive current was unexplained and neither of the courts below required an explanation of the respondent, although the respondent offered no testimony from any witness connected with the original installation to prove that, at least originally, the manufacturer's recommendations were followed. But it is not only the excessive current about which petitioners complain. It is the added fact that Coast Guard personnel took no steps during the periodic inspections of the light to discover the gradual cumulative effect of the current, whether normal or abnormal. Respondent's personnel did

[1] The witnesses Brooks and Stone were the only persons who had anything to do with the maintenance of the light. Brooks suggested that "the base electrician" checked the amperage of the sun relay current (R. 378) but the electrician did not so testify.

not inspect the contacts in the sun relay in order to discover and correct incipient failure before it occurred, but rather conceived their duty to require no more than replacement of the mechanism if, as and when it failed.

Professor James Cronvich of the Tulane University School of Engineering commented upon the characteristics and performance of the relay (R. 249):

"Q. Is it a correct statement to say that the—an excessive amount of current being allowed to pass through the silver contact points would increase the likelihood of pitting?

A. It would.

Q. And the greater the amount of current, the greater the amount of pitting?

A. That's correct.

Q. If you found, as a purely hypothetical situation, that the silver contacts in a relay such as we have here were pitted to an extent which broke the circuit and prevented the operation of a light such as Chandeleur Light, would it be your opinion that this condition could only result from an excessive amount of current being allowed to pass through the contact points?

A. I would say yes, assuming—as I recall it—this relay was in service only two years.

Q. In other words, you would say that then the rated amperage recommended by the manufacturer had been exceeded?

A. That's right."

"THE COURT: Well, you don't know whether there was any pitting or not, do you?

THE WITNESS: No, I don't know. I just assumed from what I've been told.

MR. READ: I asked him to assume that.

THE COURT: I understand."

"BY MR. READ:

Q. Assuming that the relay was operated with the rated limits of the manufacturer's recommendations for a two-year period, would there have occurred sufficient pitting to have caused a failure of the relay?

A. Within his recommendations I doubt that it should have caused sufficient pitting for trouble."

Under cross-examination by counsel for the government, Professor Cronvich stated (T. 254):

"Q. As to the pitting, can you say definitely that a sun relay system operated within the manufacturer—that these contacts operated within the manufacturer's specifications and amount of current could not fail?

A. It would be very highly improbable because of the number of operations which you have are so very small in the life of a typical relay like that compared with the ordinary contacts which you might have.

Q. But it might for causes unknown. There might be a pitting that would not be explainable on the basis of ordinary functioning?

A. No. If there is pitting there should be some reason for the pitting and certainly with the low currents which are expected to get in there, the amount of pitting in the number of operations which that relay should give should be very small."

Respondent's expert, Harvey, agreed with Professor Cronvich (R. 322-324):

"Q. Now, I assume that you're familiar - - - I know you're familiar with the fact that according to the manufacturer's recommendation there is a certain rated current which is supposed to be allowed to pass through the sun relay. Isn't that correct?

A. Yes, sir.

Q. What is that at Chandeleur?

A. At Chandeleur?

Q. Yes.

A. The only current that will pass through the sun relay would be the current that it takes to operate that protective relay is like I said approximately 48 milliamps.

Q. Well, - - - I'm reading here from a brochure which is put out by the manufacturer of this. The company happens to be the A. G. A. Division of the Elastic Stop Nut Corporation of America. That's the manufacturer. And on page - - - I guess it is page one, it's unnumbered, but I find this recommendation: 'con-

tacts are rated at 3 amperes or 25 watt A. C. and 1.5 ampere or 10 watt D. C.'
You're familiar with that, is that correct?

A. Yes, sir.

Q. Now if that rate is not exceeded would it be your opinion that the contact points inside the relay would not noticeably pit in a two year period?

A. No, sir.

Q. You think they would not become noticeably pitted in a two year period?

A. If they were - - - With the allotted ampere ratings that the book that you have in front of you gives - - - .

Q. Yes?

A. - - - after they've been out two years sometimes you will see a little bit black where the points will meet but not any excessive pitting.

Q. Well I take it that any contact being made and broken like this would cause some pitting, is that correct?

A. Well yes sir, it should.

Q. And you're saying that in a two year period, if the manufacturer's recommendations are followed, that pitting should not reach proportions which would interfere with the operation of the relay?

A. That's right, sir.

Q. So that it would be your opinion that if such a condition had occurred, then in some way an

excessive amount of current must have been allowed to pass through those contact points?

A. If it was pitted very bad, yes, sir.

Q. If it was pitted to a degree which would interfere with the operations of the relay?

A. Yes, sir.

Q. Your answer would be yes?

A. Yes."

This uncontradicted evidence showed that the contacts would not have pitted to a disabling degree in two years if the current had been within the proper limits. Moreover, the manager of the plant which manufactures the sun relay testified that even in normal use, that is, use within the proper current limits, the contact points in the relay are subject to wear (pitting), that they require cleaning and adjustment, and that the degree of pitting which will occur depends upon the load to which the contacts are subjected. His testimony was (R. 493):

"A. . . . I do believe that you must put in one other qualification and that **the contacts which make and break loads will wear, that there will be a migration of material from one element to the other, and that that must be compensated for either by readjustment or by cleaning or replacement.**

Q. That is anticipated and is very gradual, isn't it?

A. Well, it depends upon the load that is imposed upon the contacts; and, as you know, you can —a heavy load will damage a contact more

quickly than will a light load." (Emphasis ours.)

This witness further testified that the "life of the contacts are so closely interrelated to the type of load that is imposed that I don't think I could have or make any prognostications as to the possible life" of the relay. (R. 502.) He added that under a normal load the device is reliable (R. 503) and that when used under a normal load the wearing process, *i. e.*, pitting, is very gradual (R. 493). From the testimony it is obvious that the respondent had no right to assume that the relay would function indefinitely without maintenance regardless of the amount of current used.

From the testimony of the manufacturer's representative, it is apparent that the dependability of the relay is not absolute, but requires that care must be taken to assure that the recommended current is not exceeded, and that even in circumstances of normal and proper use, the contacts require cleaning and adjustment from time to time.

Chandeleur Light was under the jurisdiction of the Gulfport Light Station and Chief Stone of the Coast Guard was in charge. Stone testified at length concerning the maintenance accorded the lighthouse in general and the sun relay in particular. The contact points which failed are inside a cover over the base of the relay. Chief Stone was told never to remove that cover. (R. 399-400.) He testified as follows:

"Q. Well is it correct to say that insofar as the relay itself was concerned that your routine

check simply calls for the covering of the relay with a metal cylinder in order to determine whether the light went on?

A. That's right, sir. Yes, sir.

Q. And you did nothing further with reference to the relay other than that in your routine inspections?

A. That's right.

Q. For instance you would have no occasion to remove the base cover?

A. Not as long as that relay was working there and that connection was still good. There was no reason in the world for it.

Q. **Well then I take it that as far as you were concerned you would leave the relay out there as long as it functioned properly?**

A. **That's right.**

Q. **That is, until it failed?**

A. **That's right."** (Emphasis ours.)

In addition to the failure to conduct periodic checks in order to determine the extent of the gradual pitting process, neither Stone nor his assistant ever conducted any tests to determine whether the rated amperage recommended by the manufacturer of the relay was being exceeded. (R. 406, 370, 371.)

The respondent has rested its case on proof of periodic inspection of some but not all of the component parts of the Chandeleur Light circuit. But a chain is only as strong as its weakest link and the sun relay was the

bridge which connected the component parts of the light circuit into an effective whole. It would have required about three minutes during the periodic inspection of the light circuit to remove the base cover of the relay and check the contact points. (R. 471.) Respondent's agents did not do so because it was their intention not to prevent failure but only to repair it promptly after it occurred.

Respondent, in an effort to excuse its failure to guard against the gradual pitting process, proposed to the Trial Court a finding that "incipient failure of the contact points cannot be accurately determined by disassembly of the unit for visual inspection, because some darkening and oxidation of the silver occurs in normal use, and some pitted contacts nonetheless complete the electrical circuit, while continuity can be lost in others which superficially appear to be perfectly good." (R. 592.) The literal acceptance of this finding is of no solace to the respondent for it clearly indicates the necessity for periodic cleaning and adjustment of the contact points. The manufacturer says that under normal use contacts will be subject to pitting and do require cleaning and adjustment. This finding of fact by the trial court accepts the manufacturer's opinion. There is no indication in the record that the pitting, scoring and corrosion which caused the failure, an end result which came about by the gradual process of use, could not have been discovered if the contact points had been examined during the periodic inspections of the light, since inspections were supposed to be made once a month. (R. 349.) The manufacturer's representative said (R. 489):

> ". . . I have seen pitted contacts which have high resistance. I have seen pitted contacts which would

continue, which would have a certain continuity. **There is a degree of pitting, and I certainly cannot pose as an authority on how much a contact will tolerate before continuity is lost.**" (Emphasis ours.)

Thus it appears that the seriousness of the pitting problem is a matter of degree, and that when pitting develops beyond a certain point continuity in the circuit is lost. It is quite true that in some instances it would be impossible, by merely looking at the contact points, to ascertain whether they would or would not be conductive. But this is not to say that the failure of the contact points could not be avoided by periodic examination, for if the points were checked periodically they would be cleaned periodically if and when they showed signs of pitting, and the pitting would never approach a dangerous degree. Periodic checking and cleaning would prevent the pitting from approaching the danger point of broken continuity. The testimony on this point from the manufacturer's representative is as follows (R. 495):

"I don't think that there would be anything noticeable. I don't think there is any warning. I believe a light is either on or it's off. **And I believe that continuity would be maintained until a lead point of failure.** The only way that I think you would detect a gradual lessening is to put some unusual measuring laboratory-type devices to analyze the circuit. Things normally work until they fail and like the one-horse shay, they stop." (Emphasis ours.)

It is quite clear that when the manufacturer's representative says that there would not be "anything noticeable", that there would not be "any warning," that the light "is either on or it is off," he is not saying that "incipient failure," that is, pitting in its early stages, could not have been seen if the points had been examined. He is saying that mere observation of the over-all circuit would not reveal the pitting until the light failed, which is of course true, because the current through the contact points would not gradually diminish but would continue undiminished until the point of failure. The manufacturer's representative, in the above excerpt, is not referring to the appearance of the contact points themselves. He is saying that the light would burn with normal brightness while the gradual pitting was building up to that point at which the degree of pitting was such as to interfere with the continuity of the circuit. This is obvious from his reference to "some unusual measuring laboratory-type devices to analyze the circuit." He could not have been referring to the contact points themselves, for it requires no "unusual laboratory-type device" to look at the contact points and see if they are clean and undamaged or whether they are pitted and scored. Even normal pitting is obvious to the naked eye and the need for cleaning would have been obvious if an inspection had been made. The abnormal pitting, scoring and corrosion found by Holmes after the light failed would have been just as apparent before the failure as it was to Holmes afterwards. It was the lack of adequate inspection of the contact points which permitted the pitting to reach the degree which prevented the light from functioning.

ARGUMENT UNDER THE SECOND QUESTION.

Petitioners submit that the record contains affirmative evidence of the negligence of the Coast Guard personnel charged with the maintenance of Chandeleur Light; but pretermitting entirely the affirmative proof of negligence elicited from respondent's own witnesses, petitioners rely alternatively upon the specially pleaded doctrine of *res ipsa loquitur*, as the facts reflected in the record create an inexorable implication of negligence. The Appellate Court disposed of this theory with the following comment (R. 600):

> "Relying on the 'doctrine of res ipsa loquitur', a doctrine which is 'not proof and does not supply want of proof', but is merely an elegant and, to some, a mystifying way of stating 'a rule of interpretation by which evidence of facts is made to speak the logical conclusions naturally flowing therefrom', appellants seem to feel that it operates here to impose upon the United States a kind of liability without fault, making the United States, as the owner and operator of the light, an insurer against its failing.
>
> "Appellants in short seem to insist that proof merely that the light failed imposed liability upon the United States as a matter of law and, though the district judge has, upon an examination of the evidence, found and concluded that plaintiffs have not shown that the United States was at fault, it must nevertheless be cast in judgment.
>
> "We think the slightest reflection upon the meaning and application of the rule appellants invoke,

as it is stated and applied in 38 Am. Jur., p. 989, and in the cases they cite,[2] will show that this is not so."

The Court of Appeals expressed an entirely erroneous concept of the doctrine of *res ipsa loquitur* and of petitioners' reliance thereon. The doctrine does not imply liability without fault or insurer liability as, for example, the liability of a shipowner for failure to provide a seaworthy vessel. *Seas Shipping Co. v. Sieracki*, 328 U. S. 85. The obvious distinction between the doctrine of liability without fault and the doctrine of *res ipsa loquitur* is apparent from the classic definition of *res ipsa loquitur* appearing in 38 *American Jurisprudence*, page 989:

"While the mere fact of an injury will not give rise to a presumption of negligence on the part of anyone, under the doctrine of res ipsa loquitur, an expression which means, literally, the transaction speaks for itself, the facts or circumstances accompanying an injury may be such as to raise a presumption, or at least permit an inference, of negligence on the part of the defendant. The conclusion to be drawn from the cases as to what constitutes the rule of res ipsa loquitur is that proof that the thing which caused the injury to the plaintiff was under the control and management of the defendant, and that the occurrence was such as in the ordinary course of things would not happen if those who had its control or management used proper care, affords sufficient evidence, or, as sometimes stated by the courts, reasonable evidence, in the absence of explanation by the defendant,

that the injury arose from or was caused by the defendant's want of care."

The mechanism which failed in this case was under the exclusive control and management of the Coast Guard, as it was located within the structure of the lighthouse and the respondent had the only key. (R. 363-365.) The sun relay was an ordinarily reliable device, which, when properly installed and maintained, had an anticipated working life of from 20 to 60 years. (R. 592.) Respondent admits that the failure which occurred in this case was such an occurrence as in the ordinary course of things would not happen. As has been said already, the manufacturer of the sun relay conditions its reliability upon the use of a limited current through its contact points and adds that all contact points, in the course of ordinary use, incur some pitting and do require cleaning and adjustment. In this context the respondent has come forward with no testimony from anyone connected with the installation of the sun relay in the light circuit in 1949 to prove its proper installation initially, and the men charged with the maintenance of the light have said that they were not instructed or equipped to check the amount of current flowing through the contacts during 1949, 1950, and 1951, and that, furthermore, they were instructed not to go into the base of the relay in order to determine if and to what extent pitting was occurring, in spite of the fact that pitting is an expected by-product of the use of any electrical contacts.

Respondent proposed, the District Court adopted, and the Court of Appeals approved a finding of fact to the effect that "the cause of the pitting is still not known".

(R. 592.) To state the situation more accurately, however, it should be said that the cause of the pitting is known, *i. e.*, the excessive current. What is not known with certainty is the source of the excessive current. Only two witnesses with qualifications in the field of electrical circuits testified at the trial. One was Professor Cronvich, offered by petitioners; the other was Harvey, offered by respondent. Both men expressed the opinion that the pitting and scoring described by Holmes must have been caused by excessive current. Neither expert could account for the inoperative condition of the contacts in the short two-year span during which the sun relay had been installed in Chandeleur Light except by the assumption that excessive current had been used to actuate the relay. So it is not correct, as a matter of fact, to say that the cause of the pitting is not known, for the record contains convincing evidence that excessive current caused it. What the record does not show conclusively, however, is where the excessive current came from.

Petitioners submit that it is incumbent upon the respondent to come forward with an explanation of the source of the excessive current which caused the failure of the relay or to negative the possibility that negligence on its part permitted excessive current to pass through the contact points of the sun relay for a period long enough to make it fail. Petitioners have proved the cause of the failure of the sun relay, namely, the pitting of its contact points, and have also proved the cause of the pitting, namely, excessive current. No one has proved the source of the excess current, but petitioners submit that it is not incumbent upon them to come forward with a detailed analysis of the circuit, which was under the exclu-

sive control of the government for many years preceding and following the failure, in order to pin-point the exact manner in which excessive current was permitted to pass through the sun relay. It will doubtless be respondent's position here, as it was below, that there is no source from which the additional current could come, but the incorrectness of this statement can be easily demonstrated. The light circuit itself was a 32-volt circuit. Because the contact points in the relay last longer under a lower voltage, the relay was installed in an auxiliary 12-volt circuit. The manufacturer's recommendation of a maximum safe current through the contact points was 1.5 amperes at 12 volts. (R. 592.) Amperage indicates the strength of a current of electricity measured in amperes. Voltage measures the strength of an electrical force. An ohm is the unit of electrical resistance. Amperage is equal to voltage divided by ohms and the strength of a current in amperes is expressed by the following formula:

$$\text{amperage} = \frac{\text{voltage}}{\text{ohms}}$$

In the 12-volt current with which we are concerned, a current of 1.5 amperes depends upon a resistance of 8 ohms. The electromotive force of 12 volts is inherently sufficient to cause current in excess of 1.5 amperes to flow through the relay if the resistance of the circuit diminishes below 8 ohms. Professor Cronvich theorized that there may have been a short in the coil terminals of the protective relay (T. p. 255) which could have decreased the resistance of the circuit and drawn a current

in excess of 1.5 amperes through the relay. Even assuming that respondent had proved proper installation in 1949, which it did not do, since no one connected with the installation was called to testify, a short in the coil terminals of the relay some time between 1949 and 1951 is a logical explanation of the damaging current.

Respondent must admit that proper care required that the relay be used within the recommended amperage of the manufacturer. But the men in charge of Chandeleur Light were not even furnished with an ammeter, a simple instrument with which it would have been possible to measure in amperage the amount of electrical current flowing through the circuit. (R. 406.) Petitioners submit that it is incumbent upon the respondent to negative the possibility of excessive current altogether or explain it in a manner consistent with the exercise of due care by respondent's agents. This case is within the scope of the doctrine of *res ipsa loquitur* as applied by this Court in *San Juan Light & Transit Company v. Belen Requena*, 224 U. S. 89, 32 S. Ct. Reporter 399. In that case the defendant power company was held responsible for an unexplained increase in the voltage supplied to the plaintiff's residence. Exception was taken to the Trial Court's action in applying the doctrine of *res ipsa loquitur*, and Justice Van Devanter resolved the issue in the following language:

> "Exception to this instruction was taken upon the ground that it erroneously applied the doctrine of res ipsa loquitur. While recognizing that that doctrine is of restricted scope, and when misapplied is calculated to operate prejudicially, we think

there was no error in its application in this instance. The deceased was without fault. The defendant's primary wire was carrying a current of high and deadly voltage. Its secondary wire conveyed to his residence an excessive and dangerous current which could only have come from its primary wire. Had its wires and converters been in proper condition, the excessive and dangerous current would not have been communicated to its secondary wire, and the injury would not have occurred. These wires and converters were exclusively under its control, and it was charged with the continuing duty of taking reasonable precautions, proportioned to the danger to be apprehended, to maintain them in proper condition. In the ordinary or usual course of things, the injury would not have occurred had that duty been performed. Not only did the injury occur, but immediately thereafter both converters were found to be out of order; one being heated and its insulation charred, and the protecting ground wire of the other being broken or severed. Besides, the defendant engaged to supply a current of low voltage, reasonably safe and suitable for lighting, while the current delivered on this occasion was of high voltage, extremely dangerous and unsuitable for lighting purposes. These circumstances pointed so persuasively to negligence on its part that it was not too much to call upon it for an explanation.

"Of course, if the cause of the injury was one which it could not have foreseen and guarded against, it was not culpable; but in the absence of

that or some other explanation there was enough to justify the jury in finding it culpable. This was all that was meant by the instruction, reasonably interpreted. It was not a model, and, if it stood alone, might be subject to criticism. But, if read in the light of what preceded and followed it, and of the case before the jury, it was unobjectionable. When so read it rightly declared and applied the doctrine of res ipsa loquitur, which is, when a thing which causes injury, without fault of the injured person, is shown to be under the exclusive control of the defendant, and the injury is such as, in the ordinary course of things, does not occur if the one having such control uses proper care, it affords reasonable evidence, in the absence of an explanation, that the injury arose from the defendant's want of care. Inland & Seaboard Coasting Co. v. Tolson, 139 U. S. 551, 554, 35 L. ed. 270, 271, 11 Sup. Ct. Rep. 653; Zahniser v. Pennsylvania Torpedo Co., 190 Pa. 350, 42 Atl. 707; Alexander v. Nanticoke Light Co., 209 Pa. 571, 67 L. R. A. 475, 58 Atl. 1068; Trenton Passenger R. Co. v. Cooper, 60 N. J. L. 219, 38 L. R. A. 637, 64 Am. St. Rep. 592, 37 Atl. 730; Newark Electric Light & P. Co. v. Ruddy, 62 N. J. L. 505, 57 L. R. A. 624, 41 Atl. 712; 2 Cooley, Torts, 3d ed. 1424; 4 Wigmore, Ev. § 2509."

By its own evidence respondent has established that under ordinary circumstances the relay will operate for many years if properly maintained and operated. But a failure did occur, and respondent's dilemma is well stated in *Reynolds Metals Company v. Yturbide*, 258 F. (2d) 321,

in which opinion Judge Pope of the Ninth Circuit Court of Appeals included (page 330) the following quotation from Harper & James' *The Law of Torts*, Section 19.12:

> "Defendant in a res ipsa case may show by evidence how the accident happened, but ordinarily this does not entitle him to a directed verdict. The jury may still reject the evidence or find that the explanation does not preclude the likelihood of negligence. * * * In most res ipsa loquitur cases defendant cannot definitely explain the accident. His usual defense consists of proof of the precautions he did take in constructing, maintaining, and operating the injuring instrumentality. Once in a great while such proof may conclusively show that the accident did not in fact happen, or that it was not caused by defendant. But this is seldom the outcome. And where it is not, defendant is in this dilemma: the less effective his precautions to prevent the occurrence the more apt they are to appear negligent; the more effective the precautions testified to, the less likely they are to have (been) taken in this case since the accident did happen."

There is no indication in the jurisprudence that the courts have been loath to apply the doctrine of *res ipsa loquitur* against the United States in cases brought under the Federal Torts Claims Act. *D'Anna v. U. S.*, 181 F. (2d) 335; *U. S. v. Johnson*, 181 F. (2d) 577; *U. S. v. Kesinger*, 190 F. (2d) 529. In the *Kesinger* case, *supra*, the Court of Appeals for the Tenth Circuit was concerned with the crash of a government airplane and observed (page 531):

> "An airplane of a proven safe type of design taking off for an ordinary routine flight under nor-

> mal weather conditions does not crash in the ordinary course of things, unless there has been a failure to properly inspect, service and maintain it, or unless it is not operated with due care."

In the above authorities, which were cited to the Court of Appeals, the courts were of course not concerned with any concept of insurer liability or liability without fault, as the Court of Appeals erroneously assumed to be petitioners' contention in this case. These authorities involve litigations in which the courts assumed from the surrounding circumstances that **negligence had in fact occurred,** although not proved by direct evidence. In the case at hand, petitioners have never contended and do not now contend that the Coast Guard is the insurer of the perfect performance of Chandeleur Light. Petitioners have contended, on the contrary, that the evidence of respondent's own personnel shows a negligent failure to maintain the light. Alternatively, and if the positive evidence of negligence is found wanting, petitioners point to the unexplained failure within two years of a device in respondents' custody, designed to function for from 20 to 60 years, which failure has not been explained in any manner consistent with the exercise of due care by the respondent.

CONCLUSION.

The importance of the decision of which review is here sought lies in the fact that the Coast Guard is the custodian of hundreds of similar aids to nagivation along the Atlantic, Pacific and Gulf coastlines. These aids are relied upon continuously by commercial shipping and private boatsmen. The import of the decision of the Circuit

Court, approving as it does, without modification, the findings proposed to and adopted by the District Court, is twofold: First, it absolves the Coast Guard from the consequence of an obvious failure to use means readily available to discover and correct incipient failure of an aid to navigation **before** it occurs, and permits the Coast Guard to acquit itself of responsibility by prompt repair of a failure **after** it occurs, contrary to the opinion of this Court (quoted on page 3 of this brief) in which it is clearly provided that it is the Coast Guard's obligation not only to use due care to discover failures and repair them promptly but also to use due care to prevent their occurrence. Secondly, the opinion of the Court of Appeals, by its misconception of petitioners' contentions with regard to the doctrine of *res ipsa loquitur*, has nullified, in large measure, the practical application of the opinion of this Court in this case by equating the doctrine of *res ipsa loquitur* with the concept of liability without fault or insurer liability. By construing reliance upon the doctrine of *res ipsa loquitur* as reliance upon the doctrine of liability without fault, the Court of Appeals has deprived petitioners of the real benefit to be derived from *res ipsa loquitur*, and has disposed of petitioners' rights, **not on the basis of whether or not negligence has been proved, but on the assumption that petitioners seek recovery from a respondent against whom no charge of negligence is made.** Petitioners have never contended that they are entitled to a judgment based upon insurer liability, or liability without fault, and the Court of Appeals

has applied a false standard in judging the responsibility of the respondent.

When a failure of an aid to navigation maintained by the Coast Guard occurs, a party injured as a result of the failure will in most instances, if not always, find it impossible to prove negligence, when negligence has in fact occurred, without the assistance afforded by the doctrine of *res ipsa loquitur*, properly applied. For this doctrine, if it does nothing else, at least requires the Coast Guard to come forward with an explanation of the failure, or if the cause of the failure cannot be discovered, with evidence of the manner in which the device which failed was procured, installed, checked and maintained so that the Court can decide whether, under all of the circumstances, the failure occurred in spite of the exercise of due care by the Coast Guard. To approach a case of this kind, as the Court of Appeals has done, as one in which the Court is required to decide, not whether the Coast Guard was negligent, but rather whether the Coast Guard is liable as an insurer, without negligence, is to prejudge the very question which is at the heart of the problem. Having prejudged the question of negligence, a Court will obviously be less critical and less demanding in weighing the testimony of Coast Guard personnel with regard to what transpired prior to the failure.

The opinion of the Court of Appeals in this case modifies in large measure this Court's requirement that the Coast Guard must use due care to make certain that lighthouses are kept in good working order. It is of obvious importance to the shipping industry and to the operators

of private pleasure craft in coastal waters. It is submitted that the case is a proper one for the exercise of this Court's certiorari jurisdiction.

Respectfully submitted,

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APPENDICES

APPENDIX "A".

FINDINGS OF FACT AND CONCLUSIONS OF LAW OF THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF LOUISIANA

FINDINGS OF FACT AND CONCLUSIONS OF LAW

(Number and Title Omitted.) Filed: October 8, 1959)

CHRISTENBERRY, J.

The foregoing matters have been consolidated for trial, and having been tried to the court without a jury, the court having heard evidence and the arguments of counsel and having taken time to consider the matters, hereby makes the following Findings of Fact and Conclusions of Law:

FINDINGS OF FACT

1. Indian Towing Company, Inc., is a corporation organized and existing under the laws of Louisiana, and on or about October 1, 1951, and at all times material hereto, was the owner of the Tug NAVAJO.

2. United Marine Company is a Louisiana partnership composed of Lester F. Alexander, Leslie B. Durant, Wiley F. Wroten and William E. Padel, and on or about October 1, 1951, and at all times material hereto, was the owner of the Barge AS-16 which was under charter to Upper Mississippi Towing Corporation.

3. Upper Mississippi Towing Corporation is a corporation organized and existing under the laws of Minne-

sota, and on or about October 1, 1951; and at all times material hereto, had a towage contract with Indian Towing Company pursuant to which the Tug NAVAJO was to tow the Barge AS-16 from Tampa, Florida, to New Orleans, Louisiana.

4. Minnesota Farm Bureau Service Company is a corporation organized and existing under the laws of Minnesota, and on or about October 1, 1951 and at all times material hereto, owned a cargo of triple super phosphate aboard the Barge AS-16.

5. United Firemen's Insurance Company is a corporation organized and existing under the laws of New York, and on or about October 1, 1951 and at all times material hereto, was the insurer of the cargo of triple super phosphate aboard the Barge AS-16.

6. The General Insurance Company is a corporation organized and existing under the laws of Washington, and on or about October 1, 1951 and at all times material hereto, was the hull insurer of the Barge AS-16.

7. The United States of America, through the United States Coast Guard, on or about October 1, 1951, and at all times material hereto, owned, maintained and operated an Aid to Navigation identified as Chandeleur Light situated near the NW end of the northermost of the Chandeleur Islands, Gulf of Mexico, approximately 22 miles in a straight line and 26-27 miles by boat from Gulfport, Mississippi, the location of the nearest manned Coast Guard shore station. The light itself was atop a 99-foot structure and had a visibility of 16 miles in

clear weather. It was automatic in operation, and drew its power from a bank of storage cells, totaling 32 volts. A component element of the system was a sun relay switch or unit by which the light was caused to function only during hours of darkness.

8. In 1949 when the light was made electric and automatic in operation, its resident personnel was discontinued. Primary responsibility for its maintenance and operation was assigned the Gulfport Light Attendant Station, Gulfport, Mississippi, which also had such responsibility for approximately 55 other lighted aids to navigation. At that time and subsequently through October 1951 and to the date of trial, instructions for the inspection and maintenance of Chandeleur Light called for a check of the component elements at least once every thirty days, which inspection included a check of the functioning of the whole by artificially darkening the sun relay unit, thus causing the light to come on, if all were in working order.

9. Shipping interests and the public generally were notified of the unmanned status through "Local Notice to Mariners No. 107" of 1949. All published light lists subsequent to 1949 have designated the Chandeleur Light as unmanned and this was shown in the 1951 Light List by the symbol "U" which was defined:

> "U after the name of the light indicates the light is unwatched. All lighted buoys are unwatched. Unwatched lights may become irregular or extinguished although such apparatus have a high degree of reliability."

10. The NAVAJO was a pilothouse-controlled single screw 900 HP Diesel propelled steel hull vessel of 88 foot length, 22 foot beam and 8½-9 foot draft. On or about October 1, 1951, and at all times material hereto, her personnel consisted of a captain, a mate, two engineers, two deckhands and a cook. She was equipped with a radio, a radio direction finder and a standard magnetic compass, but had no radar and her fathometer was inoperative. She had aboard the charts of the Gulf Coast area, the Light Lists and some other navigational publications, but did not have Tide and Current Tables.

11. The AS-16 was an unmanned steel barge of 190 foot length, 40 foot beam, and 9½ foot draft. During the voyage here involved she was fully loaded with triple super phosphate, and from the time of departure from Tampa Bar to her grounding she was towed astern the NAVAJO at the end of a 800-900 foot manila hawser.

12. The NAVAJO and her tow departed Tampa Bar at 10:00 P. M. September 28, 1951, going directly in open water in her landfall off Sand Island Light at the entrance to Mobile Bay, reaching a position approximately 5 miles off the light at 6:00 P. M. September 30, 1951, having averaged 7 knots for the 311 mile distance. She then proceeded westerly and parallel to the coast to a point approximately 5-6 miles abeam of the Horn Island Light, reaching this position at 9:20 P. M. September 30, 1951, and having averaged 6.9 knots for the 23 mile distance. The wind at this time was approximately 30-35 miles per hour, waves were approximately 5-6 feet and visibility not more than 10 miles. Her master, who regularly had the 6 to 12 watch, was at the conn.

13. After leaving the position abeam Horn Island Light, the master followed a compass course of 268° magnetic intending to make good an actual course of 265° magnetic. Wind and sea conditions continued substantially the same, but visibility gradually lessened. The 3° allowance of course set over course intended was to compensate for the northeast wind, the effect of which the master thought would be substantially reduced by a tide continuing on the flood during this time. Actually, however, as he could have determined from tide tables if they had been aboard, the tide did not continue on the flood for this period, but went to the ebb on or before 10:30 P. M. on the night of September 30th-October 1st, 1951. With weather conditions such as existed at that time, a tidal flow of up to four knots could have been reasonably anticipated. The NAVAJO, then past Horn Island Light and on her way toward Ship Island Pass, was thus strongly set to the south by both wind and tide, which were now cumulative in effect.

14. The master was to be relieved at 12 o'clock midnight by the mate who was assigned the 12 to 6 watch. Between 11:30 P. M. and 12 midnight, prior to his time to take over, the mate attempted to ascertain the position of the NAVAJO and her tow and found that the master did not know "where he was at". No fixed of any kind had been obtained by the master in the two hours and forty-nine minutes since leaving Horn Island. Accordingly, the mate refused to relieve the master of the conn.

15. The master remained at the conn, and despite being lost, continued on the same compass course and the same speed until he ran aground at 12:20 A.M. October

1, 1951, less than a mile from the northernmost tip of Chandeleur Island. From the time she left her position abeam Horn Island until the time of the grounding the NAVAJO had averaged 6.53 knots for the distance of 19.6 miles.

16. With an inoperative fathometer, the NAVAJO could determine the depth of the water she was in only by taking soundings with a hand lead line. These, to be accurate and reliable, must be taken at dead slow speed, which with a tug and tow, such as the NAVAJO and the AS-16, requires a slowing and regaining speed that costs 10-15 minutes in lost time. The NAVAJO could not have taken more than one or possibly two such soundings and maintained her average speed of 6.53 knots between her Horn Island fix and her grounding.

17. At the time of grounding visibility had been reduced to 4-5 miles. The course actually made good from the NAVAJO'S position off Horn Island to her grounding was 253 magnetic. A course of 265 magnetic, such as her master thought he was on, would have carried the vessel and her tow to the north and outside the then range of visibility of Chandeleur Light, and he would never have seen it, but would have instead picked up the sea buoy midway between Chandeleur and Ship Islands.

18. With a visibility of 4-5 miles and heading west from his Horn Island fix at an average speed of 6.53 knots, the master of the NAVAJO should have expected to sight either the sea buoy midway between Chandeleur and Ship Island, or Chandeleur Light itself, not later than

midnight, twenty minutes before his grounding. At this point, if he had not identified his position, he had then run out his time. Proper and competent seamanship in such a situation is either to anchor in order to determine position, or to effect a 180° change in direction and go back over the original course. To proceed on with the same course and speed was to invite the disaster that occurred.

19. The NAVAJO was first to touch bottom, and the master immediately sought to avoid stranding his tug by backing and turning. In aid of this maneuver the mate cut the hawser to the AS-16, setting the barge adrift while still afloat. During or shortly subsequent to this maneuvering, the searchlight of the NAVAJO which had not been used since leaving Tampa was lighted for the first time, and the crew members were able to see a structure on shore which was identified as the structure of Chandeleur Light. The light itself was not functioning.

20. The barge, set adrift, grounded approximately 1000-2000 feet from the base of the Chandeleur Light structure and the tug proceeded on to Gulfport, Mississippi, without her tow. As a result of the stranding the AS-16 was damaged and her cargo damaged and or lost.

21. The Tug NAVAJO on October 1, 1951 and at all times material hereto, was inadequately equipped, unseaworthy and unfit for safe navigation of the waters surrounding Chandeleur Island in that she did not have aboard tide and current tables in an area characterized by strong and abruptly changing tidal currents, and in that her fathometer was inoperative in an area of shoal waters and low, sandy islands of limited visibility.

22. The Tug NAVAJO was in charge of and being navigated by a master who was careless, incompetent, negligent and at fault in the following particulars:

(a) He placed absolute reliance on an unmanned and unwatched light.

(b) He made inadequate and improper allowances for tide, wind and weather conditions.

(c) He did not properly consult or use such navigational aids, facilities and equipment as the NAVAJO did carry.

(d) He continued under way at the same course and speed despite having run his time out on his expected sighting if he had been on his dead reckoning course.

(e) He continued under way at the same course and speed despite not knowing his position.

(f) He continued into shoal waters, not knowing the depth, and taking insufficient and or unreliable soundings.

(g) He ran his vessel and her tow aground on a well known and fully charted body of land.

23. The stranding of the AS-16 with the resultant damage to the hull of the barge and the damage and or loss of her cargo was caused proximately by the unsafe, unfit and unseaworthy condition of the Tug NAVAJO, and particularly her inadequate and improperly maintained navigational aids, facilities and equipment; and by the gross carelessness, incompetence, negligence and fault of her master as set out above.

24. The Coast Guard had no notice from any source of the failure of Chandeleur Light prior to approxi-

mately 10:30 P. M. October 2, 1951. At that time the Coast Guard Cutter NIKE, returning to station in Gulfport from patrol off Campeche, Mexico, having failed to pick up the loom of the light off the Chandeleur Islands, had anchored and determined that the light was not functioning. She forthwith radioed this information to the Coast Guard District Office in New Orleans, which in turn immediately sent out a broadcast to all shipping interests and the public generally, notifying them that the light was extinguished.

25. The Coast Guard used all means reasonably available to it in discovering that Chandeleur Light was out, and gave immediate warning by radio and publication of the fact of the extinguishment of the light to all shipping interests and the public generally.

26. At the same time the Coast Guard District Office broadcast warning that Chandeleur Light was extinguished, the Coast Guard Cutter SALVIA was dispatched to correct the nonfunctioning of Chandeleur Light. She arrived off Chandeleur Islands the following morning, October 3, 1951, and succeeded in relighting the light in the afternoon of that day. The fact of relighting was immediately broadcast to all shipping interests.

27. The Coast Guard, after discovery that Chandeleur Light was out, acted with all possible speed in repairing and relighting it.

28. In restoring Chandeleur Light to normal operating condition, the party assigned this task from the SALVIA checked all component elements of the light system. The sun relay unit was found to be malfunctioning.

This unit was removed from its position, at which time its base was found to be partially filled with mud from dirt daubers, a species of wasp, but none of this mud was in the interior part where the silver contact points which make and break the circuit are located. The unit was disassembled and a fine deposit with pitting was found on the contact points. These were cleaned and adjusted, and the unit reassembled, placed back in position, connected and checked. The entire light was then found to function normally.

29. There had been no indication of failure or malfunctioning of the sun relay unit or any other part of the Chandeleur Light system during the entire time between its installation in 1949 and the outage in October 1951. The last regular inspection of the Chandeleur Light had been made on September 7, 1951, approximately three weeks prior to the grounding of the NAVAJO and its tow. At that time the regular checks were made, including the artificial darkening of the sun relay, and the light operated normally. No irregularities or malfunctioning of any sort were found.

30. The malfunctioning of the sun relay unit, which in turn caused the outage of Chandeleur Light, was not due to the mud in its base, but was due to a failure of the silver contact points, because of pitting, to complete the electrical circuit of the relay system. The cause of this pitting, sufficient to bring about failure in this installation, which had not occurred previously and has not occurred subsequently up to the date of trial, is still not known. As installed in the Chandeleur Light system the unit had a separate 12 volt circuit with a total current

flowing through it of .048 amperes, less than 1 30th the maximum safe current permitted by the manufacturer's specifications for this unit of 1.5 amperes at 12 volts.

31. Incipient failure of the contact points cannot be accurately determined by disassembly of the unit and visual inspection, because some darkening and oxidation of the silver occurs in normal use, and some pitted contacts nonetheless complete the electrical circuit, while continuity can be lost in others which superficially appear to be perfectly good.

32. The sun relay unit as used in the Chandeleur Light system is of standard design, having been originally devised by the Swedish scientist, Gustaf Dalen, around the turn of the century and manufactured in something similar to its present state by the same concern, the American Gas Accumulator Company, since 1921 or 1922. It is the most reliable of the light-actuated switches, and when installed in such a station as Chandeleur Light has an anticipated working life without failure of from 20 to 60 years. Its failure on station was an occurrence that could not have been reasonably foreseen.

33. The Coast Guard used due care to make certain that Chandeleur Light was kept in good working order. The standards set, and the adherence to these standards, show no negligence whatsoever on its part.

34. The casualty complained of was not caused or contributed to by any act or neglect of governmental personnel but was occasioned solely by negligence, fault, carelessness and incompetence in the maintenance and operation of the NAVAJO and her tow.

CONCLUSIONS OF LAW

1. This court has jurisdiction of these actions, and venue is properly laid in the Eastern District of Louisiana; 28 USC 1346.

2. Running aground on a well known and fully charted body of land in itself raises a presumption of negligence and fault. The Helen B. Moran, 255 F. 342; New York Trap Rock Corporation v. The Dynamic, 50 F. Supp. 507, aff'd 136 F. (2d) 683. Not only was this presumption not rebutted by plaintiffs, but negligence and lack of reasonable and due care in the maintenance and operation of the NAVAJO were affirmatively shown.

3. The Tug NAVAJO on October 1, 1951 was unseaworthy for the area in which she was being navigated in the following respects: (1) She was in charge of and being navigated by an incompetent master; (2) she did not have tide and current tables, which were necessary navigational information; and (3) her fathometer was inoperative. The Maria, 91 F. (2d) 819; The T. J. Hooper, 60 F. (2d) 737. Her unseaworthiness was a proximate cause of the stranding, which in turn led to the loss and damage in question.

4. The Tug NAVAJO and her tow on October 1, 1951 were navigated in a careless, reckless, imprudent and unseamanlike fashion in the following respects (1) inadequate and improper allowances were made for tide, wind and weather conditions; (2) the same course and speed were maintained despite the fact that her position was unknown; (3) the same course and speed were maintained despite the failure to pick up her sightings; (4)

the same course and speed were maintained in shoal waters without taking proper soundings; and (5) from her last known position to her grounding no check or determination of any kind was made to find out if any discrepancy existed between the course actually made good and the course intended to be made, but instead, absolute reliance for warning in the event of such discrepancy was placed on an unmanned light known to be subject to irregularity or extinguishment. These errors of navigation were a proximate cause of the stranding, which in turn led to the loss and damage in question.

5. The Coast Guard had neither actual nor constructive notice that Chandeleur Light was out on October 1, 1951, and the failure on the part of the NAVAJO to know that the light was out was not caused by any negligence or lack of due and reasonable care on the part of the Coast Guard. Russell, Poling & Company v. Conner Standard Marine Corp., 252 F. (2d) 167.

6. Taking into account its own past experience and the experience of others with the sun relay unit, together with what was inherently probable from the nature of the device itself, the Coast Guard could not have reasonably anticipated the failure on October 1, 1951, of the unit from pitted contact points, which in turn caused extinguishment of Chandeleur Light. The Germanic, 196 U. S. 589; Ford v. Tremont Lumber Co., (La. 1909), 49 So. 492. The bare possibility of such failure is not a basis upon which to predicate a wrong. Brady v. Southern Railway Co., 320 U. S. 476. In maintaining and operating Chandeleur Light as an aid to navigation, the Coast Guard used due and reasonable care in the performance of its

duty. Indian Towing Company v. United States, 350 U. S. 61.

7. The damage to the AS-16 and the damage to and or loss of her cargo growing out of her stranding on October 1, 1951, was not caused or contributed to in any way by any act or neglect of the United States, its agents, servants or employees, and plaintiffs accordingly are not entitled to recovery from the United States.

8. The United States is entitled to judgment in its favor dismissing the complaints herein with costs.

New Orleans, Louisiana, October 8, 1959.

s/ Herbert W. Christenberry

UNITED STATES DISTRICT JUDGE

APPENDIX "B".

OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

IN THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

NO. 18038

INDIAN TOWING CO., INC., ET AL.,
Appellants,

versus

UNITED STATES OF AMERICA,
Appellee

Appeals from the United States District Court for the Eastern District of Louisiana

---

(February 29, 1960)

Before RIVES, Chief Judge, and HUTCHESON and TUTTLE, Circuit Judges.

HUTCHESON, Circuit Judge: Plaintiffs, owners of the Barge AS-16 and her cargo, in separate suits, consolidated for trial, for damages against the United States resulting from the grounding of the Barge on Chandeleur Island when, on the night of September 30-October 1, 1951, the Chandeleur light failed, are here appealing from judg-

ments finding the United States not guilty of negligence and dismissing plaintiffs' claims.

Entered upon full findings of fact and conclusions of law which, setting out in detail, and stating the effect of, the relevant evidence, the judgments found and held that the United States was not negligent or in any way at fault in installing and maintaining the light, and that the damage to the barge and its cargo was caused by the unsafe, unfit, and unseaworthy condition of the barge and the gross carelessness, incompetence, negligence and fault of the master.

Attacking as clearly erroneous the findings and conclusions (1) that the Coast Guard was not negligent in the installation and/or maintenance of Chandeleur light, and (2) that the stranding of the Barge AS-16 was caused solely by the Tug Navajo, and was not caused or contributed to by any negligence on the part of the United States, the appellants insist that the findings and judgments may not stand. We do not think so.

The case was tried by the court without a jury, and the district judge, in his function as trier of the facts, resolved the fact issues against the plaintiffs. Appellants, however, argue the appeal as though the district judge had determined, as matter of law, that a verdict against plaintiffs was demanded and had directed one accordingly. Of course, this will not at all do. All that occurred here is that the district judge, on evidence we think fully supporting his finding, determined that plaintiffs did not sustain their burden of showing that defendant was at fault and gave judgments accordingly.

Relying on the "doctrine of res ipsa loquitur", a doctrine which is "not proof and does not supply want of proof" but is merely an elegant and, to some, a mystifying way of stating "a rule of interpretation by which evidence of facts is made to speak the logical conclusions naturally flowing therefrom", appellants seem to feel that it operates here to impose upon the United States a kind of liability without fault, making the United States, as the owner and operator of the light, an insurer against its failing.

Appellants in short seem to insist that proof merely that the light failed imposed liability upon the United States as a matter of law and, though the district judge has, upon an examination of the evidence, found and concluded that plaintiffs have not shown that the United States was at fault, it must nevertheless be cast in judgment.

We think the slightest reflection upon the meaning and application of the rule appellants invoke, as it is stated and applied in 38 Am. Jur., p. 989, and in the cases they cite, will show that this is not so.

In Reynolds Metals Co. v. Yturbide, 258 F. (2d) 321, the case most strongly relied on by appellants, at page 331 the court said:

> "When res ipsa loquitur is applied, the facts of the occurrence warrant the inference of negligence. They furnish substantial evidence of negligence where the direct evidence of it may be lacking, but they make a case to be decided by the jury. In finding itself in the dilemma mentioned by Harper

and James in the language quoted above, the appellant is in no different situation than any other defendant who finds itself in a res ipsa case and before a jury. It is not as appellant asserts the victim of the application of a rule of absolute liability." (Emphasis added.)

In Smith v. United States, 96 F. (2d) 976, at pp. 977-8, where the doctrine was invoked to meet the burden of proof imposed upon the libellant, this court, affirming the judgment of the district judge, finding the United States not guilty of negligence, stated:

"Appellant has not produced any direct evidence to support his allegations of negligence. * * * To meet the burden of proof imposed upon him he relies upon the doctrine of res ipsa loquitur. Neither the happening of the event nor any circumstances surrounding the same points to any negligent act or omission which caused the batten to give way and injure appellant. In the absence of such a showing, the application of the doctrine would make appellee an insurer against the accident. Cf. Burton v. Greig, 5 Cir., 271 Fed. 271; The Tawmie, 5 Cir., 80 F. (2d) 792. The doctrine is not applicable in any case unless, by process of probable reasoning, the facts and circumstances point out the wrongdoer the tortious character of his act and exclude other probable causes of the injury. The doctrine is not proof and does not supply a want of proof." (Emphasis added.)

Because the evidence supporting his findings and judgment is set out fully and fairly in the findings and

conclusions of the district judge, with which we agree, it will serve no useful purpose for us to repeat the statement here. It will be sufficient for us to refer with approval to it and to declare; that we cannot say that any of the findings are clearly erroneous; that, indeed, we are of the clear opinion that the judgment was right and should be affirmed.

AFFIRMED.

APPENDIX "C".

JUDGMENT OF THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

JUDGMENT.

Extract from the Minutes of February 29, 1960.

INDIAN TOWING CO., INC., ET AL.,

No. 18038. versus

UNITED STATES OF AMERICA.

This cause came on to be heard on the transcript of the record from the United States District Court for the Eastern District of Louisiana, and was argued by counsel;

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be, and the same is hereby, affirmed.

APPENDIX "D".

SUPREME COURT OF THE UNITED STATES

No.———, *October Term, 1959.*

INDIAN TOWING CO., INC. ET AL.,
Petitioners.

v.

UNITED STATES

ORDER EXTENDING TIME TO FILE PETITION FOR WRIT OF CERTIORARI

UPON CONSIDERATION of the application of counsel for petitioner(s),

IT IS ORDERED that the time for filing petition for writ of certiorari in the above-entitled cause be, and the same is hereby, extended to and including June 30th, 1960.

(S) HUGO L. BLACK

Associate Justice of the Supreme Court of the United States.

Dated this , *19*
day of May, 1960.

APPENDIX "E".

28 U. S. C. Section 1346 (b)

Subject to the provisions of chapter 171 of this title, the district courts, together with the District Court for the Territory of Alaska, the United States District Court for the District of the Canal Zone and the District Court of the Virgin Islands, shall have exclusive jurisdiction of civil actions on claims against the United States, for money damages, accruing on and after January 1, 1945, for injury or loss of property, or personal injury or death caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment, under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred.

APPENDIX "F":

14 U. S. C. 81

In order to aid navigation and to prevent disasters, collisions, and wrecks of vessels and aircraft, the Coast Guard may establish, maintain, and operate:

(1) aids to maritime navigation required to serve the needs of the armed forces or of the commerce of the United States;

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Office Supreme Court, U.S.
FILED
JUL 26 1960
AUG. Clerk

No. 195

In the Supreme Court of the United States

OCTOBER TERM, 1960

INDIAN TOWING CO., INC., ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

J. LEE RANKIN,
Solicitor General,

GEORGE COCHRAN DOUB,
Assistant Attorney General,

ALAN S. ROSENTHAL,
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UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the United States District Court for the Eastern District of Louisiana (Pet. App. A, pp. 37-50) is reported at 182 F. Supp. 264. The opinion of the Court of Appeals for the Fifth Circuit (Pet. App. B, pp. 51-55) is reported at 276 F. 2d 300.

JURISDICTION

The judgment of the Court of Appeals was entered on February 29, 1960 (Pet. App. C, p. 56). On May 19, 1960, the time for filing a petition for a writ of certiorari was extended by order of Mr.

Justice Black to and including June 30, 1960, (Pet. App. D, p. 57). The petition was filed on June 29, 1960. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the courts below had basis for finding that the United States Coast Guard used due care in installing and maintaining a lighthouse known as Chandeleur Light.

2. Whether the courts below correctly held that, in the circumstances shown, the doctrine of *res ipsa loquitur* was inapplicable.

STATEMENT

Petitioners brought this action under the Federal Tort Claims Act to recover for property damage allegedly sustained when, on the night of September 30, 1951, the Tug NAVAJO, towing a steel barge loaded with phosphate, ran aground on Chandeleur Island off the Mississippi Coast. At the time of the grounding, Chandeleur Light was inoperative. The gravamen of the complaint was that the failure of the light was the result of negligence, and that the light failure was the proximate cause of the grounding and damage.

Following this Court's decision in *Indian Towing Co.* v. *United States*, 350 U.S. 61, holding that the complaint stated a cause of action, the case was tried on the merits. The district court found that there was no negligence upon the part of the Coast Guard

and that the damage had been proximately caused by the condition and operation of the NAVAJO. The Court of Appeals affirmed.

The facts, as found by the district court (Pet. App. A, pp. 37-50), are as follows:

Chandeleur Light is an automatically operated beacon located atop a 99 foot structure, drawing its power from a bank of storage cells totalling 32 volts. A component element of the system was a sun relay unit causing the light to function only during hours of darkness. In 1949, when the light was made automatic, its resident personnel were removed. At that time, shipping interests and the public generally were notified of the unmanned status of the lighthouse. "Local Notice to Mariners No. 107" of 1949.[1]

The NAVAJO was equipped with a radio, a radio direction finder and a standard magnetic compass, but she had no radar and her fathometer was inoperative. Although she had some navigational publications aboard, she did not carry Tide and Current Tables. At the time of the grounding, the wind was approximately 30-35 miles per hour, the visibility was up to 10 miles, and her master was at the helm. (F. 7-12, Pet. App. A, pp. 38-40.)

The court found that the master had erroneously

---

[1] See, United States Coast Guard, *Light List, Atlantic and Gulf Coasts of the United States*, corrected to January 1, 1951 (C.G. 158), pp. 5, 498. This publication also advised mariners that, although lights may have a high degree of reliability, unwatched lights "may become irregular or extinguished." *Id.*, p. 5.

determined the flow of the tide and, as a result, was considerably off course. Moreover, the court found that the master was "careless, incompetent, negligent and at fault" in that he (1) placed absolute reliance on Chandeleur Light, (2) made inadequate and improper allowances for tide, wind and weather, (3) did not properly use such navigational aids as the NAVAJO did carry, (4) continued on the same course and speed even though he was no longer sure where he was, (5) continued into shallow waters without taking reliable soundings and (6) ran his vessel and her tow aground on a well known and fully charted body of land. The court found that the sole and proximate cause of the damage to the cargo and the barge itself was the unsafe, unfit, and unseaworthy condition of the tug NAVAJO and the gross carelessness, incompetence, negligence and fault of her master. (F. 22-23, Pet. App. A, p. 44,)

The district court further found that the Coast Guard had no prior notice of the failure of Chandeleur Light and that the light was immediately restored to working condition. The Coast Guard party assigned to this task found that the sun relay unit was malfunctioning. The unit was disassembled and a fine deposit with pitting was found on the contact points. The points were cleaned and adjusted and the unit reassembled and connected. The light then functioned normally. There had been no indication of failure or prior malfunctioning of the sun relay unit or any other part of the light during the entire time between installation and the grounding incident. The malfunctioning of the light was found to be the result

of the failure of the contact points, because of pitting, to complete the electrical circuit of the relay system. (F. 24-31, Pet. App. A, pp. 44-47.)

The court also found that the cause of this pitting, which had never previously occurred, was not determinable. (F. 30, Pet. App. A, p. 46). Nor was there any way in which incipient failure of the contact points could be accurately determined by disassembly of the unit and visual inspection, since some darkening and oxidation occurs in normal use and since some contacts, although pitted, may nonetheless complete the electrical circuit while continuity can be lost in others which appear on the surface to be perfectly good. The switch was reliable, with an anticipated working life without failure of from 20 to 60 years. As the district court stated, the "failure on station was an occurrence that could not have been reasonably foreseen" and the Coast Guard had used due care in making certain that the Chandeleur Light was kept in good working order (F. 31-33, Pet. App. A, p. 47).

On the basis of these findings, the district court concluded that the unseaworthiness and the negligent operation of the tug NAVAJO were the proximate cause of the damage complained of, that the Coast Guard had exercised reasonable care, and that no evidence of negligence on its part was established. Accordingly, the court granted judgment to the United States.

The Court of Appeals for the Fifth Circuit affirmed. It rejected petitioners' argument that the findings and conclusions were clearly erroneous. It also re-

jected petitioners' attempted application of the doctrine of *res ipsa loquitur*.

ARGUMENT

Both courts below have determined that the Coast Guard was not negligent in the installation or maintenance of Chandeleur Light and that the negligence and unseaworthiness of the tug NAVAJO were the proximate cause of the casualty. We submit that these determinations were fully warranted. Moreover, they are based on the particular facts disclosed by the record and do not present questions of general importance. There is no occasion for further review by this Court.

1. Petitioners contend that the issue here is "whether the failure of the lighthouse contributed to the grounding of the barge" (Pet. 5), and that "[i]n deciding this case with emphasis on the negligence of the Tug NAVAJO, the District Court and the Court of Appeals have impliedly and erroneously attributed that negligence to the barge and her cargo." (Pet. 6.) Liability under the Tort Claims Act is dependent, however, upon negligence on the part of Government employees. 28 U.S.C. 1346(b). Not only have petitioners been unable to prove such negligence but, to the contrary, the evidence established, and the courts below found, that the sole and proximate cause of accident was the negligence of the NAVAJO.

Petitioners renew their argument below on the factual question of the cause of the light's malfunctioning. Ignoring the findings of the district court,

they conclude that the cause was a lack of adequate inspection by the Coast Guard, which permitted the pitting to prevent the light from functioning (Pet. 6-22). However, the district court expressly found that "[t]he cause of this pitting, sufficient to bring about failure in this installation, which had not occurred previously and has not occurred subsequently up to the date of trial, is still not known." (F. 30 Pet. App. A, p. 46.) The court concluded that "the Coast Guard could not have reasonably anticipated the failure on October 1, 1951, of the unit from pitted contact-points, which in turn caused extinguishment of Chandeleur Light." (Pet. App. A, p. 49.) The unit had never before failed and, installed in 1949, it had an anticipated working life without failure of from 20 to 60 years. The Court of Appeals affirmed these findings (Pet. App. B, pp. 54-55).

This Court has repeatedly ruled that it will not go behind concurrent findings of the lower courts and grant further review of questions of fact, *e.g.*, *Great Atlantic & Pacific Tea Co.* v. *Supermarket Equipment Corp.*, 340 U.S. 147, rehearing denied, 340 U.S. 918; *The Germanic*, 196 U.S. 589. Petitioners present no new arguments and no persuasive reason to upset the findings below.

2. Petitioners' alternative argument is that the doctrine of *res ipsa loquitur* should have been invoked on the facts of this case. But, as petitioners themselves recognize (Pet. 24), there are two conditions precedent to the application of the doctrine: (1) the thing which has produced the injury must have been

within the complete control and management of the defendant, and (2) the occurrence must have been one which in the ordinary course of events does not happen if due care has been exercised. *San Juan Light Co.* v. *Requena*, 224 U.S. 89, 98-99; *Jesionowski* v. *Boston & Maine R. Co.*, 329 U.S. 452, 456. Neither of these conditions is present here.

The Chandeleur Light was not "the thing which caused the injury." Rather, the trial court found that the damage was occasioned solely by negligence and incompetence in the maintenance and operation of the NAVAJO (F. 34, Pet. App. A, p. 47). Although the accident might not have happened had the light been operative, its failure did not produce the injury.

Moreover, Chandeleur Light was not under such "control and management" of the United States as to bring it within the doctrine. The light is a complicated set of automatically functioning equipment, miles from the nearest Coast Guard Station. It is unmanned, difficult of access, and is not within sight of the mainland. It is subject to many forces independent of the Coast Guard.

Finally, even with proper care, a complex light can fail in the ordinary course of events. The trial court found that due care was used to keep the light in good working order (F. 33, Pet. App. A, p. 47) and that its failure was not the result of negligence. It is apparent that a complex light structure can fail even in the absence of any negligence. The Coast Guard is not under an insurer's duty to maintain perfect lighthouses; its duty is to provide reasonable mainte-

nance and inspection so as to keep navigational lights in as good working order as is reasonably possible. In its earlier decision in this case, *Indian Towing Company* v. *United States*, 350 U.S. 61, 69, this Court observed that the responsibility to maintain the light includes the duty of using due care to discover when the light becomes extinguished and to repair it or give warning (as the Coast Guard did here (Pet. App. A, pp. 44-45)). In answer to the question whether this particular failure was one which might occur in the absence of negligence, the trial court held that it was, and that the failure of the light could not have been reasonably foreseen (F. 32, Pet. App. A, p. 47). In short, the mere occurrence did not warrant an inference of negligence.

There is a further answer. Even assuming the applicability of *res ipsa loquitur* to the case at bar, the doctrine is one which serves only to shift the burden of going forward with the evidence. *Smith* v. *United States*, 96 F. 2d 976 (C.A. 5). The Government carried this burden by establishing affirmatively that due care had been exercised and that failure of Chandeleur Light could not have been reasonably foreseen.

CONCLUSION

For the reasons stated, it is respectfully submitted that the petition for a writ of certiorari should be denied.

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Attorneys.

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